APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 08-0655-cv(L) and 08-2280-cv(CON)

[Filed June 3, 2009]

CLIFTON MALLERY, also known as Enjai Omaa Eele, and AMNAU KARAM EELE,	)
Plaintiffs-Appellants,	)
v.	)
NBC UNIVERSAL, INC., NBC UNIVERSAL TELEVISION STUDIO, TAIL WIND PRODUCTIONS, TIM KRING, DENNIS HAMMER, ALLAN ARKUSH, JEPH LOEB, and BRYAN FULLER,	)
Defendants-Appellees.	)

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE

32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 3rd day of June, two thousand nine.

Present:

HON. ROGER J. MINER,
HON. ROBERT A. KATZMANN,
HON. REENA RAGGI,
Circuit Judges.

For Plaintiffs-Appellants:	MICHAEL CONFUSIONE, Hegge & Confusione, LLC, Haddonfield, NJ
For Defendants-Appellees NBC Universal, Inc. and NBC Universal Television Studio:	MARCIA B. PAUL (Lacy H. Koonce, III, *on the brief*), Davis Wright Tremaine LLP, New York, NY Hilary Lane, NBC Universal, Inc., *on the brief*, New York, NY

Appeal from the United States District Court for the Southern District of New York (Cote, *J.*).

ON CONSIDERATION WHEREOF, it is hereby **ORDERED, ADJUDGED**, and **DECREED** that the case is **AFFIRMED**.

Plaintiffs-Appellants appeal from the judgment of the United States District Court for the Southern District of New York (Cote, *J.*) dismissing their complaint and from the judgment granting Defendants-Appellees' application for attorneys' fees. We assume the parties' familiarity with the facts of the case, its procedural history, and the scope of the issues on appeal.

After converting Defendants' motion to dismiss into a motion for summary judgment, the district court granted the motion, finding that the relevant works are not substantially similar as a matter of law. *See Mallery v. NBC Universal, Inc.*, No. 07 Civ. 2250, 2007

WL 4258196, 2007 U.S. Dist. LEXIS 88960 (S.D.N.Y. Dec. 3, 2007).

Although a district court generally should give parties specific notice of its intent to convert a motion to dismiss into a motion for summary judgment, specific notice is not required in all circumstances. *See, e.g., Gurary v. Winehouse*, 190 F.3d 37, 43 (2d Cir. 1999). "The essential inquiry is whether the appellant should reasonably have recognized the possibility that the motion might be converted into one for summary judgment or was taken by surprise and deprived of reasonable opportunity to meet facts outside the pleadings." *Id.* (internal quotation marks omitted). In this case, the district court concluded that the only materials pertinent to the motion for summary judgment were incorporated in the complaint by reference. Because the motion was decided by reviewing only materials contained in the pleadings, Plaintiffs were not deprived of an opportunity to meet facts outside the pleadings.

Summary judgment was appropriate in this case because no reasonable jury could find that there was substantial similarity between Defendants' television series, *Heroes*, and the original, protectible elements of Plaintiffs' works. *See Kregos v. Associated Press*, 3 F.3d 656 (2d Cir. 1993).

As the district court aptly described:

> *Heroes* is a hour-long suspense/drama that mixes moments of action, humor, and mystery as it follows an eclectic, international group of genetically enhanced heroes and their quest to prevent a catastrophic explosion in New

> York--an explosion that may be caused, it turns out, by one of their own number. *The Letter*, by contrast, is a fifteen-minute, documentary-style film with a jaunty soundtrack that presents an account of [the main characters'] attempt to warn Robert De Niro and Tribeca Films about September 11. . . . [T]he two stories are not similar in mood, details or characterization, and, indeed, differ in nearly every relevant way. *The Twins* also presents a stark contrast to *Heroes*; it is a sprawling, fantastical story about, among many other things, two spiritual "twins" who are married to one another and are members of a mysterious "Divination Clan." . . . [T]he context, presentation, plot lines, narrative structure, and style of the two works are substantially different . . . .

Mallery, 2007 WL 4258196, at *8, 2007 U.S. Dist. LEXIS 88960, at *23-24 (citation and internal quotation marks omitted). The few and isolated similarities that Plaintiffs have identified are unprotected ideas or scènes à faire. *See generally MyWebGrocer, LLC v. Hometown Info, Inc.*, 375 F.3d 190, 194 (2d Cir. 2004) ("Scenes a faire are unprotectible elements that follow naturally from a work's theme rather than from an author's creativity."); *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996).

Having dismissed Plaintiffs' complaint, the district court acted within its discretion in granting Defendants' application for attorneys' fees. The district court properly concluded that Plaintiffs' claims were objectively unreasonable, "as the profound dissimilarity between their works and *Heroes* was

indeed 'obvious.'" Given this conclusion, the district court did not abuse its discretion granting Defendants' application for attorneys' fees. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994) (approving of the district court's consideration of a party's "objective unreasonableness" when exercising discretion in awarding attorneys' fees under the Copyright Act); *see also Matthew Bender & Co. v. West Publ'g Co.*, 240 F.3d 116, 121 (2d Cir. 2001) ("Subsequent to *Fogerty*, several other circuits have accorded the objective reasonableness factor substantial weight in determinations whether to award attorneys' fees).

We have considered Plaintiffs' remaining arguments and find them to be without merit. Accordingly, for the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

By:_____

APPENDIX B

UNITED STATES DISTRICT
SOUTHERN DISTRICT OF NEW YORK

No. 07 Civ. 2250 (DLC)

[Filed April 11, 2008]

CLIFTON MALLERY a/k/a ENJAI OMAA EELE and AMNAU KARAM EELE,	)
Plaintiffs,	)
- against -	)
NBC UNIVERSAL, INC., NBC UNIVERSAL TELEVISION STUDIO, TAIL WIND PRODUCTIONS, TIM KRING, DENNIS HAMMER, ALLAN ARKUSH, JEPH LOEB and BRYAN FULLER,	)
Defendants.	)

JUDGMENT ON ATTORNEYS FEES

Defendants having moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), and the matter having come before the Honorable Denise Cote, United States District Judge, and the Court, on December 3, 2007 and February 21, 2008, having rendered its Opinion and Order and Memorandum Opinion and

Order granting defendants' motion to dismiss which was converted to a motion for summary judgment, and the Court having entered Judgment in favor of defendants on February 22, 2008; and

Defendants having filed an application for attorneys fees pursuant to 17 U.S.C. § 505 and Federal Rule or Civil Procedure 54(d), and the matter having come before the Honorable Denise Cote, United States District Judge, and the Court, on March 18, 2008, having rendered its Memorandum Opion and Order granting defendants' application, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum Opinion and Order dated March 18, 2008, judgment is entered in the amount of $99,106.45 in attorneys fees under 17 U.S.C. § 505, and post-judgment interest under 28 U.S.C. § 1961 shall accrue on the total Judgment amount from the date of entry of the Judgment until the Judgment is satisfied.

The Clerk of the Court is directed to enter this Judgment in accordance with the aforesaid.

Dated: New York, New York
April 11, 2008

/s/
Honorable Denise Cote
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 07 Civ. 2250 (DLC)

[Filed March 18, 2008]

CLIFTON MALLERY a/k/a ENJAI OMAA EELE and AMNAU KARAM EELE,
Plaintiffs,

-v-

NBC UNIVERSAL, INC., NBC UNIVERSAL TELEVISION STUDIO, TAILWIND PRODUCTIONS, TIM KRING, DENNIS HAMMER, ALLAN ARKUSH, JEPH LOEB and BRYAN FULLER,
Defendants.

MEMORANDUM OPINION AND ORDER

Appearances:

For Plaintiffs:
John A. Coleman, Jr.
Freidberg Cohen Coleman & Pinkas, LLP
444 Madison Avenue, Suite 805
New York, NY 10022

For Defendants:
Marcia Beth Paul
Lacy H. Koonce
Davis Wright Tremaine LLP
1633 Broadway
New York, NY 10019

Hilary Lane
NBC Universal, Inc.
Legal Department
30 Rockefeller Plaza
New York, NY 10122

DENISE COTE, District Judge:

Plaintiffs Clifton Mallery a/k/a Enjai Omaa Eele and Amnau Karam Eele ("plaintiffs") brought this action against the defendants NBC Universal, Inc., NBC Universal Television Studio, Tailwind Productions, Tim Kring, Dennis Hammer, Allan Arkush, Jeph Loeb, and Bryan Fuller ("defendants") alleging that the television series Heroes, which is (collectively) written, produced, and broadcast by the defendants, infringed the copyrights held by the plaintiffs in their 777-page handwritten novel The Twins: Journey of the Soul ("The Twins"), their short film based on The Twins entitled The Letter, and their painting series Envious of America. Defendants moved to dismiss, and the motion was converted to a motion for summary judgment and granted in an Opinion dated December 3, 2007. Mallery v. NBC Universal, Inc., No. 07 Civ. 2250 (DLC), 2007 WL 4258196 (S.D.N.Y. Dec. 3, 2007) (the "December 2007 Opinion"). As the prevailing party in this copyright action, defendants have now filed an application for attorney's fees pursuant to 17 U.S.C. § 505 in the amount of

$99,106.45. For the reasons stated below, that application is granted.

DISCUSSION

The Copyright Act permits a court "in its discretion" to award costs, including a "reasonable attorney's fee," to the prevailing party in a copyright infringement action. 17 U.S.C. § 505. In deciding whether to award such costs and fees, courts may consider, among other factors, "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 n.19 (1994) (citation omitted). The Court of Appeals has held that the factor of "objective unreasonableness" should be given "substantial weight" in conducting the analysis called for in Fogerty, Matthew Bender & Co., Inc. v. West Publ'g Co., 240 F.3d 116, 122 (2d Cir. 2001), and courts of this Circuit have awarded fees under § 505 based on a finding of objective unreasonableness alone. See, e.g., Adsani v. Miller, No. 94 Civ. 9131 (DLC), 1996 WL 531858, *13 (S.D.N.Y. Sept. 19, 1996) (citing cases); see also Baker v. Urban Outfitters, Inc., 431 F. Supp. 2d 351, 357 (S.D.N.Y. 2006). In any event, these factors must be applied in a manner that is "faithful to the purposes of the Copyright Act," Fogerty, 510 U.S. at 534 n.19, which is "'[t]o promote the Progress of Science and useful Arts.'" Id. at 527 (quoting U.S. Const. art. I, § 8, cl. 8)). As both the prevention of infringement and the successful defense of unmeritorious copyright claims can further this goal, the Supreme Court has held that awards under § 505

are equally available to prevailing defendants and prevailing plaintiffs. Id. at 526-27, 533.

Although a finding that a defendant is entitled to summary judgment does not automatically entitle that defendant to attorney's fees pursuant to § 505, see Adsani, 1996 WL 531858, at *16 (citing CK Co. v. Burger King Corp., No. 92 Civ 1488 (CSH), 1995 WL 29488, *1 (S.D.N.Y. Jan. 26, 1995)), the December 2007 Opinion demonstrates that the plaintiffs' copyright infringement claims were objectively unreasonable. As described in that Opinion, a careful review of the plaintiffs' works and Heroes television program reveals that the plaintiffs' "claims are wholly without merit, as nearly every instance of alleged similarity between Heroes and the plaintiffs' work relates to unprotectable ideas rather than protectable expression and, viewed more broadly, the 'total concept and feel' of these works are profoundly different." December 2007 Opinion, at *6 (quoting Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 140 (2d Cir. 1998)). In particular, the plaintiffs' argument that the use of a "stopping the catastrophe" story arc, symbols, close-up images of eyes, "twin" characters (i.e., characters that often appear together on screen), and block lettering in title sequences made Heroes and the plaintiffs' works substantially similar bordered on the frivolous, both legally and factually. Id. at *7. The comparison plaintiffs attempted to draw between Isaac Mendez of Heroes and the characters depicted in the plaintiffs' work was likewise objectively unreasonable as a matter of law, id. at *6, and fact. Id. at *7.

Plaintiffs argue in opposition to the fee application that "determinations about substantial similarity are

rarely obvious," citing Pasillas v. McDonald's Corp., 927 F.2d 440, 444 (9th Cir. 1991), and that the plaintiffs "truly believe" that, in light of alleged similarities, defendants did copy their work. Even assuming the truth of both of these statements, however, plaintiffs' claims remain objectively unreasonable, as the profound dissimilarity between their works and Heroes was indeed "obvious" in this case, and plaintiffs' professed subjective belief to the contrary is thus itself unreasonable and entitled to no weight here. In addition, an award under § 505 in this case would "advance considerations of compensation and deterrence," Fogerty, 510 U.S. at 534 n.19 (citation omitted), as "failing to award attorney's fees to defendants . . . would invite others to bring similarly unreasonable actions without fear of any consequences." Earth Flag Ltd. v. Alamo Flag Co., 154 F. Supp. 2d 663, 668 (S.D.N.Y. 2001). It is therefore appropriate to award attorney's fees to the defendants under § 505.

Thus, it is now necessary to consider whether the $99,106.45 requested by the defendants represents a "reasonable attorney's fee." 17 U.S.C. § 505. In making this determination, courts should apply "the lodestar method," which "emphasiz[es] a comparison to rates of lawyers of similar skill and experience in the community," Crescent Publishing Group, Inc. v. Playboy Enters., Inc., 246 F.3d 142, 150 (2d Cir. 2001) (citing Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983) (42 U.S.C. § 1988)), while keeping in mind that, "for prevailing parties with private counsel, the actual billing arrangement" should be considered "a significant, though not necessarily controlling, factor in determining what fee is 'reasonable.'" Id. at 151.

Defendants have submitted in support of their application detailed billing reports stating the rates charged by defense counsel and the hours spent on each litigation task. Plaintiffs do not argue that defense counsel's rates are unreasonable, but rather that the time spent drafting the defendants' motion papers -- 145.5 hours, by plaintiffs' count -- "seems excessive." Having reviewed the billing records, as well as defendants' submissions in connection with the motion to dismiss, plaintiffs' argument on this point is rejected. The plaintiffs' claims stemmed from a sprawling tale in a lengthy hand-written novel, a film, and a series of paintings, and a host of alleged similarities with a successful television series. To address the entirety of the plaintiffs' claims, it was entirely reasonable for the defendants to expend this effort on their motion practice.

Finally, both of the plaintiffs have submitted identical, three-sentence affidavits reporting, in substance, that they "have no home, no job, no regular income, no money and no financial assets," and requesting that the Court take these facts into account in addressing defendants' application. While it is not contested that the relative financial status of the parties may be an appropriate consideration in determining whether an award under § 505 is reasonable, see Adsani, 1996 WL 531858, at *16, plaintiffs' brief, unsupported affidavits are insufficient to alter the analysis in this case. The otherwise reasonable award sought by the defendants will therefore not be reduced on the basis of claimed financial hardship.

CONCLUSION

The defendants' application for $99,106.45 in attorney's fees under 17 U.S.C. § 505 is granted. The Clerk of Court shall close the case.

SO ORDERED:

Dated: New York, New York
March 18, 2008

/s/
DENISE COTE
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 07 CIVIL 2250 (DLC)

[Filed February 22, 2008]

CLIFTON MALLERY a/k/a ENJAI OMAA EELE and AMNAU KARAM EELE,	)
Plaintiffs,	)
- against -	)
NBC UNIVERSAL, INC., NBC UNIVERSAL TELEVISION STUDIO, TAIL WIND PRODUCTIONS, TIM KRING, DENNIS HAMMER, ALLAN ARKUSH, JEPH LOEB and BRYAN FULLER,	)
Defendants.	)

JUDGMENT

Defendants having moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), and the matter having come before the Honorable Denise Cote, United States District Judge, and the Court, on December 3, 2007 and February 21, 2008, having rendered its Opinion and Order and Memorandum Opinion and

Order granting defendants' motion to dismiss which is converted to a motion for summary judgment, it is

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order and Memorandum Opinion and Order dated December 3, 2007 and February 21, 2008, defendants' motion to dismiss is converted to a motion for summary judgment and is granted; judgment is entered in favor of defendants.

Dated: New York, New York
February 22, 2008

J. MICHAEL McMAHON
Clerk of Court

BY:

/s/
Deputy Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON _____

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 07 Civ. 2250 (DLC)

[Filed February 21, 2008]

CLIFTON MALLERY a/k/a ENJAI OMAA EELE and AMNAU KARAM EELE,
Plaintiffs,

-v-

NBC UNIVERSAL, INC., NBC UNIVERSAL TELEVISION STUDIO, TAILWIND PRODUCTIONS, TIM KRING, DENNIS HAMMER, ALLAN ARKUSH, JEPH LOEB and BRYAN FULLER,
Defendants.

MEMORANDUM OPINION AND ORDER

Appearances:

For Plaintiffs:
John A. Coleman, Jr.
Freidberg Cohen Coleman & Pinkas, LLP
444 Madison Avenue, Suite 805
New York, NY 10022

For Defendants:
Marcia Beth Paul
Davis Wright Tremaine LLP
1633 Broadway
New York, NY 10019

DENISE COTE, District Judge:

On December 4, 2007, an Opinion and Order was entered on the docket in this action granting summary judgment for the defendants in this copyright action. Following several failed attempts to electronically file a notice of appeal from this Opinion and Order, plaintiffs moved on February 5, 2008, pursuant to Rule 4(a)(5), Fed. R. App. P., for an extension of time to file their notice of appeal. Defendants have filed opposition. For the reasons stated below, plaintiffs' motion is denied as moot, as the notice of appeal filed by plaintiffs on February 5, 2008, in connection with their motion is timely and no extension of time under Rule 4(a)(5) is required.

Following the entry of the December 4, 2007, Opinion and Order on the docket, judgment was not set forth on a separate document as required by Rule 58, Fed. R. Civ. P. Thus, pursuant to Rule 4(a)(7)(A)(ii), Fed. R. App. P., judgment has not yet been "entered" within the meaning of Rule 4(a)(1)(A). As a result, the 30-day time limitation provided by Rule 4(a)(1)(A) has not yet begun to run, and will not begin to run until the earlier of (1) the setting forth of the judgment on a separate document as required by Rule 58, Fed. R. Civ. P., or (2) 150 days from the entry of the December 4, 2007, Opinion and Order. The

plaintiffs' notice of appeal filed on February 4, 2008, is therefore timely as filed under Rule 4, Fed. R. App. P.[1]

CONCLUSION

Plaintiffs' February 5, 2008, motion for an extension of time to file a notice of appeal is denied as moot, and the notice of appeal filed on February 5, 2008, is deemed timely. The Clerk of Court is directed to enter judgment in favor of the defendants pursuant to this Court's Opinion and Order of December 4, 2007.

SO ORDERED:

Dated: New York, New York
February 21, 2008

/s/
DENISE COTE
United States District Judge

[1] Plaintiffs may also take note that, under Rule 4(a)(7)(B), the "failure to set forth a judgment or order on a separate document . . . does not affect the validity of an appeal from that judgment or order."

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

07 Civ. 2250 (DLC)

[Filed December 3, 2007]

CLIFTON MALLERY a/k/a ENJAI OMAA EELE and AMNAU KARAM EELE,
Plaintiffs,

-v-

NBC UNIVERSAL, INC., NBC UNIVERSAL TELEVISION STUDIO, TAILWIND PRODUCTIONS, TIM KRING, DENNIS HAMMER, ALLAN ARKUSH, JEPH LOEB and BRYAN FULLER,
Defendants.

OPINION AND ORDER

Appearances:

For Plaintiffs:
John A. Coleman, Jr.
Freidberg Cohen Coleman & Pinkas, LLP
444 Madison Avenue, Suite 805
New York, NY 10022

For Defendants:
Marcia Beth Paul
Davis Wright Tremaine LLP
1633 Broadway
New York, NY 10019

DENISE COTE, District Judge:

Plaintiffs Clifton Mallery a/k/a Enjai Omaa Eele and Amnau Karam Eele ("plaintiffs") bring this action against the defendants NBC Universal, Inc., NBC Universal Television Studio, Tailwind Productions, Tim Kring, Dennis Hammer, Allan Arkush, Jeph Loeb, and Bryan Fuller ("defendants") alleging that the television series Heroes, which is (collectively) written, produced, and broadcast by the defendants, infringes the copyrights held by the plaintiffs in their 777-page handwritten novel The Twins: Journey of the Soul ("The Twins"), their short film based on Twins entitled The Letter, and their painting series Envious of America. On June 15, 2007, defendants moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons stated below, the motion to dismiss is converted to a motion for summary judgment and is granted.

BACKGROUND

The following facts are taken from the complaint. Plaintiffs are "divination artists" known professionally as "The Twins." On April 22, 2005, plaintiffs screened their short film The Letter at Hunter College in New York City, exhibited paintings from their series Envious of America, and presented a lecture on their art. At this event, they also made available excerpts from their novel The Twins. Persons identifying

themselves as writers from defendant Tim Kring's ("Kring") television show Crossing Jordan attended the event and "are believed to have taken copies" of those materials. Plaintiffs also screened The Letter at several other venues, and sent excerpts of The Twins along with a copy of The Letter to several entertainment executives, including to a corporate affiliate of defendants NBC Universal and NBC Universal Television Studio.

Defendant Kring conceived the idea for the television series Heroes around October or November of 2005. Heroes debuted on NBC in September 2006, and twenty-three episodes of the series had aired at the time the motion to dismiss was filed, constituting the first season of the series. Plaintiffs allege that Heroes is "so strikingly similar" to their works The Twins, The Letter, and Envious of America that Kring and the other defendants "must have had access to and copied" their work.

DISCUSSION

I. Governing Copyright Standards

"Copyright infringement is established when the owner of a valid copyright demonstrates unauthorized copying." Tufenkian Import/Export Ventures, Inc v. Einstein Moomjy, Inc., 338 F.3d 127, 131 (2d Cir. 2003) (quoting Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 137 (2d Cir. 1998)). In order to prevail on a claim for infringement, a copyright holder must show (1) "that his work was actually copied," and (2) "that the copying amounts to an improper or unlawful appropriation." Castle Rock Entm't, 150 F.3d at 137 (citation omitted).

Under the first prong, "[b]ecause direct evidence of [actual] copying is seldom available, a plaintiff may establish copying circumstantially by demonstrating that the person who composed the defendant's work had access to the copyrighted material, and that there are similarities between the two works that are probative of copying." Jorgensen v. Epic/Sony Records, 351 F.3d 46, 51 (2d Cir. 2003) (citation omitted). Similarities between the works are "probative" if, "under all the circumstances, [they] make independent creation unlikely." Laureyssens v. Idea Group, Inc., 964 F.2d 131, 140 (2d Cir. 1992) (citation omitted).

The second prong requires a plaintiff to demonstrate "unlawful appropriation." This reflects a recognition that even where "actual copying" may have occurred, not all such copying is actionable under the copyright laws. To establish "unlawful appropriation," a plaintiff must demonstrate "substantial similarity" between the original and allegedly infringing works. Tufenkian Import/Export Ventures, 338 F.3d at 131 (citation omitted). The works are "substantially similar" if the similarities are "more than de minimis," and if "it was protected expression in the earlier work that was copied." Id. (citation omitted). Where the copying is not literal or does not plagiarize the protected work, infringement may nonetheless occur. Id. at 132-33. To determine whether a defendant has infringed a plaintiff's copyright in these circumstances, a court must "analyze the . . . works closely to figure out in what respects, if any, they are similar, and then determine whether these similarities are due to protected aesthetic expressions original to the allegedly infringed work, or whether the similarity is to something in the original that is free for the taking." Id. at 134-35.

For the purposes of this motion, defendants do not contest that the plaintiffs hold registered copyrights in The Twins, The Letter, or Envious of America,[1] or deny that they had access to these works. Rather, defendants argue that there is simply no "substantial similarity" between these works and the television show Heroes, and that plaintiffs' copyright infringement claim therefore fails as a matter of law. Plaintiffs counter by pointing out both general and specific similarities between the works in question.

In light of the arguments presented, this motion is properly treated as a motion for summary judgment. Whether certain works are substantially similar to one another is a question of fact to be resolved by a jury. Cf. Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 111 (2d Cir. 2001) (citing Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998)). "However, a district court may determine noninfringement as a matter of law on a motion for summary judgment either when the similarity concerns only noncopyrightable elements of plaintiff work, or when no reasonable trier of fact could find the works substantially similar." Walker v. Time Life Films, Inc., 784 F.2d 44, 48 (2d Cir. 1986); see also Williams v. Crichton, 84 F.3d 581, 587 (2d Cir. 1996). Although the defendants filed their motion pursuant to Fed. R. Civ. P. 12(b)(6), the arguments raised in the defendants' motion papers and in the plaintiffs' opposition have focused almost exclusively on these questions -- i.e.,

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[1] Although the defendants' do not press this argument, it may be noted that the complaint itself and the record to date do not reflect that Envious of America, or any of the paintings that make up that series, have been registered with the copyright office.

whether the alleged similarities relate to noncopyrightable elements and whether any reasonable observer could consider the works substantially similar -- and thus it is appropriate to convert this motion to one for summary judgment in order to address the merits of the arguments raised by the parties.[2] Before a discussion of the merits can proceed, however, it is first necessary briefly to review the works in question.

II. Summary of Works at Issue

A. The Twins

The Twins is a 777-page, handwritten novel co-authored by the plaintiffs. It chronicles the lives of Idai and Hadah, "twins" who are separated before birth into two different wombs by their grandmother, a mystic named Madame Naomi Dachette. "The Twins,"

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[2] A district court must ordinarily give notice to the parties before converting a motion to dismiss to a motion for summary judgment. See, e.g., Kopec v. Coughlin, 922 F.2d 152, 154-55 (2d Cir. 1991). "A party is deemed to have notice that a motion may be converted," however, "if that party should reasonably have recognized the possibility that such a conversion would occur." Sira v. Morton, 380 F.3d 57, 68 (2d Cir. 2004) (citation omitted). Given the arguments raised by the parties (as well as the cases cited, which almost exclusively resolve such arguments on motions for summary judgment), the parties should have reasonably recognized that the instant motion could be converted to one for summary judgment. In any event, the parties have suffered no prejudice as a result of the conversion, as the works in question are the only documents it is necessary to review in order to resolve the questions presented by the motion; thus, "all material made pertinent to [a motion for summary judgment] by Rule 56" is already before the Court. Fed. R. Civ. P. 12(b).

as they are referred to, are born in the same small town in Louisiana, and are aware from a young age that they possess certain special abilities, which are partly genetic and partly spiritual in origin. Early in the novel, for example, Idai predicts the crash of a plane carrying Dylan Renway, an inhabitant of the town. This prediction is embodied in a "sketch" made by Idai. Idai attempts to warn Dylan's mother about the crash, but she ignores Idai's warning, and Idai later sees in the newspaper that his prediction came true. Later in the novel, Idai will also make predictive sketches relating to, among other things, the Columbine shootings and George W. Bush's election in Florida.

The female twin, Hadah, also has the ability to see the future, which she depicts in artwork affixed to the backs of doors. Hadah also has several other powers, including the ability to make her enemies bleed using only her mind, and to transcend space and time. (Idai also appears to share these powers.) In addition, Idai and Hadah are both skilled martial artists.

The Twins are initiated into the Li-Maa Divination Clan by their grandmother, a "Diviner" who is the head of the Clan, as well as Servitor Ti-Qui Saru, a Diviner and "Nem-Fa" who can, among other things, walk through walls. The initiation rituals are elaborate and mystical. For example, the "opening the ground" ritual involves, inter alia, a sheet of fire in which "500,000 faces" appear and enter Hadah's body, and a stone that rises out of the ground and pulls Hadah down into the earth.

Idai and Hadah's families attempt, for a time, to hide The Twins' special abilities, and during this time

Idai works as an engineer for oil companies in Texas, Kuwait, and Mexico, and Hadah works as a salesperson at a jewelry store and fashion model. Idai and Hadah eventually marry, and live in Los Angeles, Miami, and Manhattan.

In addition to tracing the origins and experiences of Idai and Hadah, The Twins follows numerous additional storylines and characters. For example, the novel tells the story of Olagaia Atune, who is born into poverty in Cuba, becomes an art dealer in America, discovers his own special powers -- such as the ability to erase people's memories -- and searches for The Twins and two sacred twin statues. A character by the name of Professor Heinman also searches for The Twins, along with other people with "special abilities." Maitre Jess, a Hatian voodoo priestess, is a rival of Madame Dachette's with whom The Twins do battle. Maitre Jess's story is, in turn, intertwined with the story of several families from Cuba, including the Atune, Ferrer, Vega, and Illadro families, some of whom become involved with Maitre Jess, The Twins, the Santeria religion, and drug and organ trafficking.

The bulk of the novel concerns the intersecting story lines of the characters listed above (along with many others) and the physical and spiritual conflict between The Twins and Maitre Jess. In the last twenty-five pages, Idai makes another sketch prophesying the future, this time predicting that two planes will destroy the Twin Towers on September 11.[3]

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[3] The copyright page of the novel states that it was written in June of 2001. Presumably, plaintiffs proffer the novel itself as proof of their own powers.

The Twins are initially hesitant to share this new "divination" with anyone, recalling that their predictions -- such as their prediction of the Columbine shootings -- are often ignored. The Twins overcome this initial reluctance and travel to the Port Authority to tell someone about their divination, and there they learn that Larry Silverstein is about to buy the doomed buildings. The Twins meet with several people who work for Silverstein in an attempt to warn him about the impending attack. They agree to pass on The Twins' warning to Silverstein, but apparently to no avail, as the novel ends with The Twins watching the first plane hit the Twin Towers.

The tone and pacing of The Twins is sprawling and mystical. The narrative is an undifferentiated stream of description and dialogue without guiding punctuation, and the novel shifts repeatedly between various settings, including Louisiana, Cuba, Miami, Texas, Africa, Paris, New York, and more ethereal realms.

B. The Letter

The Letter is a short film that plaintiffs assert is based on The Twins. The film deals with The Twins' purported efforts to warn Robert De Niro and his company, Tribeca Films, of the September 11 attacks. The Letter opens with a photograph of outer space, which is then superimposed on two figures (presumably The Twins), who walk down a hallway towards a wall on which there are several hand-drawn images. The most prominent image is a symbol that plaintiffs refer to as a "cosmogram": a circle bisected by two straight lines, dividing it into four equal quadrants, as in a simplified Celtic cross. Background

music begins to play -- a somewhat playful and repetitive tune driven by an acoustic guitar and a single male voice -- and the camera zooms into the center of the circle.

As the music continues to play, the captions state that, "[i]n March 2001 four views to September 11, 2001 were hand delivered by The Twins to Jane Rosenthal at Tribeca Films, owned by Robert De[]Niro." These "four views" are then catalogued. They are entitled: (1) "1st View: SIXTH RACE © 1995." This "view" is an image of the painting "Sixth Race," created by plaintiffs, which depicts several ghostly figures gathered around a central figure who appears to be wearing military medals. A photograph of George Bush and Alan Greenspan standing in a similar posture is then superimposed over this image, which plaintiffs state represents a "validation" of the "prediction" contained in the painting. (2) "2nd View: Compliant © 1999." Various symbols (crosses, letters, "cosmograms," etc.) appear one-by-one on the screen in several dozen rows to the sound of a typewriter. The bottom-right corner of the screen contains a section of a "cosmogram."[4] (3) "3rd View: AMNAU'S DIVINING BOARD © 2000." This "view" depicts a door on which various newspaper articles, photographs, and other assorted materials (e.g., a packet of sugar from the United Nations) are mounted, including one scrap of paper that refers to the World Trade Center. (4) "4th View: The Atta Page © 2001." This portion of the video slowly reveals a hand-drawn sketch that depicts, inter

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[4] Plaintiffs assert that the coded symbols "are used to predict the attacks of September 11," although The Letter itself does not suggest that interpretation.

alia, two planes crashing into the Twin Towers, the name "Atta," and the date and time of the September 11 attacks.

After the "four views" are described, the captions and video explain that these works, which plaintiffs assert predicted the September 11 attacks, were sent to Tribeca films and rejected. A pair of disembodied eyes then appears on the screen; the eyes are slowly revealed to be those of Mohamed Atta. Another video sequence shows photographs of Robert De Niro and Jane Rosenthal delivering food via boat to workers at Ground Zero, and of "The Twins" crying following the September 11 attacks.

C. Envious of America

The complaint states that Envious of America is a "series of oil-on-canvas paintings" painted in 1995 that have been exhibited at several galleries across the country. Plaintiffs assert that "The Sixth Race," which is depicted in The Letter and discussed in The Twins, is a part of that series.

D. Heroes

Heroes is an hour-long, weekly television series about ordinary people who discover that they posses extraordinary powers, and the complications, adventures, and dangers that follow. Key characters include Isaac Mendez, a comic-book artist and drug addict from New York who can "paint the future" when high on heroin; Claire Bennet, a cheerleader from Texas who can heal herself; Mr. Bennet, Claire's adoptive father, who works for an unnamed organization that tracks people with special abilities;

Mr. Bennet's assistant, "The Haitian," who can erase people's memories and block the use of certain heroes' powers; Hiro Nakamura, an office worker from Japan who can bend time and space; Matt Parkman, a policeman who can read minds; Nathan Petrelli, a politician running for Congress, who can fly; Peter Petrelli, Nathan's brother, who can "absorb" the powers of others; Sylar, a serial killer who robs others of their powers; Mohinder Suresh, a professor from India who, following in the footsteps of his slain father, seeks out those with special abilities in order to validate his father's genetic theories; and numerous others. As Mohinder and his father explain, the special powers possessed by these characters are the result of genetic changes caused by the human evolutionary process. During the twenty-three episodes of the first season, Heroes follows each of these characters as they discover their abilities and how they are meant to be used.

In an early episode, Issac paints a picture while high on heroin showing the destruction of New York City by what appears to be an atomic bomb, and Hiro -- during a brief visit to the future -- also sees the same event. Through various plot twists, several of the heroes mentioned above undertake a quest to prevent this attack, during which time the heroes are also being hunted down by Sylar, who seeks to kill them, and sought out by Mohinder, who seeks to study and help them. Toward the end of the first season, Issac is killed by Sylar, but in the final episode the destruction of the city is averted when Peter -- who, it turns out, is the source of the explosion -- is flown by his brother Nathan to a point high above the city, where Peter can explode without harming anyone.

Heroes is suffused with a general air of suspense, due to the gradual revelation of various plot elements, the mysterious nature and origins of the heroes' powers, and the haunting musical soundtrack. The series is also characterized by a visual theme that calls to mind the show's comic-book predecessors in the superhero genre, including captions rendered in a "handwritten" comic-book style.

III. Analysis and Comparison

Plaintiffs allege that Heroes infringes on their copyrights in The Twins, The Letter, and Envious of America. Having reviewed these works in some detail, it is readily apparent that these claims are wholly without merit, as nearly every instance of alleged similarity between Heroes and the plaintiffs' work relates to unprotectable ideas rather than protectable expression and, viewed more broadly, the "total concept and feel" of these works are profoundly different.[5] Castle Rock, 150 F.3d at 140.

Plaintiffs' complaint contains a litany of alleged "substantial similarities" between Heroes and either The Twins, The Letter, or both.[6] Plaintiffs focus

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[5] The parties contest whether plaintiffs' works can be considered in the aggregate for the purposes of evaluating their copyright infringement claim. As the discussion below indicates, resolution of this question is not necessary, as plaintiffs' claim fails regardless of the manner in which their works are considered.

[6] Although the infringement claim also makes reference to Envious of America, the complaint does not assert any similarities between Heroes and that painting series specifically. (Various references are made, however, to the plaintiffs "work" as a whole.)

particularly on the similarities between Idai from The Twins and Isaac Mendez of Heroes, noting that both (1) are "minorities" (Idai is African- American and plaintiffs presume Issac Mendez to be Latino), (2) have the ability to "paint the future"; (3) often paint in oil on large canvasses; (3) create depictions of "two landmark New York City buildings being destroyed" (Idai the Twin Towers, Issac the Empire State and Chrysler Buildings); (4) create paintings of a bus being destroyed in the future, which prediction is then validated in a newspaper article; and (5) attempt to stop the destruction of those buildings.

Plaintiffs' allegations regarding the similarities between Idai and Isaac cannot form the basis for a copyright infringement claim for several reasons. On the most general level, a "minority artist" who has the ability to paint the future is an "idea" that is not protected under the copyright laws. As Judge Hand memorably noted in the landmark case of Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930):

> If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare's "ideas" in the play . . . .

Id. at 121. In addition, (1) painting a future in which tragic and destructive events take place, such as the destruction of landmark buildings in New York City;

(2) having a prediction confirmed by a newspaper report; and (3) making an attempt to prevent a tragic event in light of a prediction of the future, are simply "scenes a faire, [or] sequences of events that necessarily result from the choice of a setting or situation, [which] do not enjoy copyright protection." Williams, 84 F.3d at 587 (citation omitted).

Of course, it must be recognized that "[a] character is an aggregation of the particular talents and traits his creator selected for him. That each one may be an idea does not diminish the expressive aspect of the combination." Warner Bros. v. Am. Broadcasting Cos., 720 F.2d 231, 243 (2d Cir. 1983). That said, "just as similarity cannot be rejected by isolating as an idea each characteristic the characters have in common, it cannot be found when the total perception of all the ideas as expressed in each character is fundamentally different." Id. That is the case here. In sum, Idai is a member of the fictional Li-Maa Divination Clan, as well as an engineer and martial artist, and is one of a set of spiritual twins; Issac is a comic-book artist and drug addict whose ability to paint the future is only unlocked when he is high on heroin. The "total perception" of these characters could hardly be more different, and the plaintiffs' argument that they are "identical but for the change in race" does not withstand scrutiny.

The other alleged instances of similarity between Heroes and the plaintiffs' works similarly fail to contribute to a valid claim of copyright infringement, as they also allege copying of unprotectable ideas such as a "stopping the catastrophe story arc," the depiction of a "cosmogram" (which appears in one scene in Heroes, as well as in The Letter and The Twins), the

use of symbols "to signal a plot event," characters with "extraordinary abilities," and the use of "block capital letters" in title sequences.[7] While the line between mere "ideas" and protected "expression" is famously difficult to fix precisely, see, e.g., Nichols, 45 F.2d at 121, these alleged "similarities" are textbook examples of the former.

The DVD submitted by plaintiffs in their opposition to the instant motion specifically identifies many of the alleged similarities between Heroes and The Letter, and only underscores the plaintiffs' failure to identify any actionable copying. For example, plaintiffs allege that "close up eye images are used" in both works in a way that is "virtually identical." In support of this claim, the DVD shows (1) the moment in The Letter in which Mohamed Atta's eyes are floating alone on the screen, after which his full face is revealed, and (2) a clip from Heroes in which the camera is tightly zoomed in on one character's eyes, then rapidly zooms out. Plaintiffs also argue that there are "twin characters" in both The Letter and Heroes; in support, the DVD shows an image from The Letter of The Twins walking down a hallway, followed by various scenes from Heroes in which there are two characters together on screen. Needless to say, close-ups of eyes and the depiction of two people simultaneously on screen -- or, as plaintiffs put it, the "twinning" of characters -- are not examples of protectable expression under the copyright laws. The absurd results that would follow

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[7] It may also be noted that the letters used in the title sequences of The Letter and Heroes are not typographically similar, and thus plaintiffs' claim seems to be based solely on the use of white "block capital letters" against a largely black background in both works.

from holding otherwise need not be enumerated. In sum, having "analyze[d] the . . . works closely to figure out in what respects, if any, they are similar," it must be concluded that whatever similarities may be said to exist between Heroes and plaintiffs' works are not "due to protected aesthetic expressions original to the allegedly infringed work," but rather related to ideas "in the original that [are] free for the taking." Tufenkian Import/Export Ventures, 338 F.3d at 134-35.

Plaintiffs also argue that the similarities they have identified are evidence of a "total concept and feel" shared by their works and Heroes. See, e.g., Castle Rock, 150 F.3d at 140. It is well established that "substantial similarity" may be found where a later work appropriates the "total concept and feel, theme, characters, plot, sequence, pace, and setting" of an earlier work, even if no single instance of alleged copying is itself actionable. Id.; see also Tufenkian Import/Export Ventures, 338 F.3d at 134. As the summaries above indicate, however, there is simply no "plausible claim that there is a common aesthetic appeal between" Heroes and The Twins, The Letter, or Envious of America. Castle Rock, 150 F.3d at 140. While plaintiffs have pointed out several highly generalized similarities in characterization (e.g., the ability to paint the future or erase people's memories) visual elements (e.g., the use of symbols, block lettering), and plot points (e.g., a threat to Manhattan, a solar eclipse), this "scattershot" listing "fails to address the underlying issue: whether a lay observer would consider the works as a whole substantially similar to one another," even without scrutinizing the plaintiffs' works to isolate their protected elements. Williams, 84 F.3d at 590. Having reviewed the works

in question, no reasonable juror could find that they are substantially similar.

"Once one goes beyond th[e] level of abstraction" on which the plaintiffs' proffered similarities lie, "the similarity [between the works] disappears." Id. at 589. Heroes is a hour-long suspense/drama that mixes moments of action, humor, and mystery as it follows an eclectic, international group of genetically enhanced heroes and their quest to prevent a catastrophic explosion in New York -- an explosion that may be caused, it turns out, by one of their own number. The Letter, by contrast, is a fifteen-minute, documentary-style film with a jaunty soundtrack that presents an account of The Twins' attempt to warn Robert De Niro and Tribeca Films about September 11. While, on the most abstract level, both of these works concern the prevention of a tragic and violent event in New York, the "two stories are not similar in mood, details or characterization," and, indeed, differ in nearly every relevant way. Reyher v. Children's Television Workshop, 533 F.2d 87, 92 (2d Cir. 1976). The Twins also presents a stark contrast to Heroes; it is a sprawling, fantastical story about, among many other things, two spiritual "twins" who are married to one another and are members of a mysterious "Divination Clan." Although the novel shares various superficial similarities with Heroes, as described in the complaint, the context, presentation, plot lines, narrative structure, and style of the two works are substantially different; indeed, the "the ordinary observer, unless he set out to detect" the similarities, "would be disposed to overlook them" -- precisely the opposite of what the copyright law requires to support an infringement claim. Boisson v. Banian, Ltd., 273 F.3d 262, 272 (2d Cir. 2001).

This conclusion is confirmed by a review of the case law, which reveals that creations far more comparable than Heroes and the plaintiffs' works have been found not to be "substantially similar" as a matter of law. See, e.g., Williams, 84 F.3d 581 (comparing children's book about visit to a dinosaur zoo to Jurassic Park); Walker v. Time Life Films, Inc., 784 F.2d 44 (2d Cir. 1986) (book Fort Apache and film "Fort Apache: The Bronx"); Warner Bros., 720 F.2d 231 (works containing the character "Superman" and television show "The Greatest American Hero"); Reyher, 533 F.2d 87 (children's book My Mother Is the Most Beautiful Woman In The World and short illustrated story for children "The Most Beautiful Woman In The World"); Nichols, 45 F.2d 119 ("Abie's Irish Rose" and "The Cohens and the Kellys"). A review of these authorities and a comparison of the works at issue here compels the conclusion that "no reasonable trier of fact could find the works substantially similar." Walker, 784 at 48. Plaintiffs' infringement claim must therefore be dismissed.

CONCLUSION

The defendants' June 15, 2007, motion to dismiss is converted to a motion for summary judgment and is granted. An Order to be issue in connection with this Opinion will establish a schedule for addressing the defendants' request for costs and fees pursuant to 17 U.S.C. § 505.

SO ORDERED.

Dated: New York, New York
December 3, 2007

/s/

DENISE COTE
United States District Judge

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 08-0655-cv(L) and 08-2280-cv(CON)

[Filed August 19, 2009]

CLIFTON MALLERY, a/k/a/ ENJAI OMAA EELE, and AMNAU KARAM EELE,

Plaintiffs-Appellants,

v.

NBC UNIVERSAL, INC., NBC UNIVERSAL TELEVISION STUDIO, TAIL WIND PRODUCTIONS, TIM KRING, DENNIS HAMMER, ALLAN ARKUSH, JEPH LOEB, and BRYAN FULLER,

Defendants-Appellees.

Before HON. ROGER J. MINER, HON. ROBERT A. KATZMANN, and HON. REENA RAGGI, *Circuit Judges*.

PER CURIAM:

The petitioner(s) for rehearing filed by Appellants is DENIED.

ENTERED FOR THE COURT:

s/ RICHARD ALCANTARA
Deputy Clerk

APPENDIX H

Example of side by side visual substantial similarity of NYC artist Enjai Eele a/k/a Idai Markus in his studio vs respondents NBC Heroes pilot script of NYC artist Isaac Mendez in his art studio <http://www.dbuu.com/scan02.pdf>

[See Foldout Page]

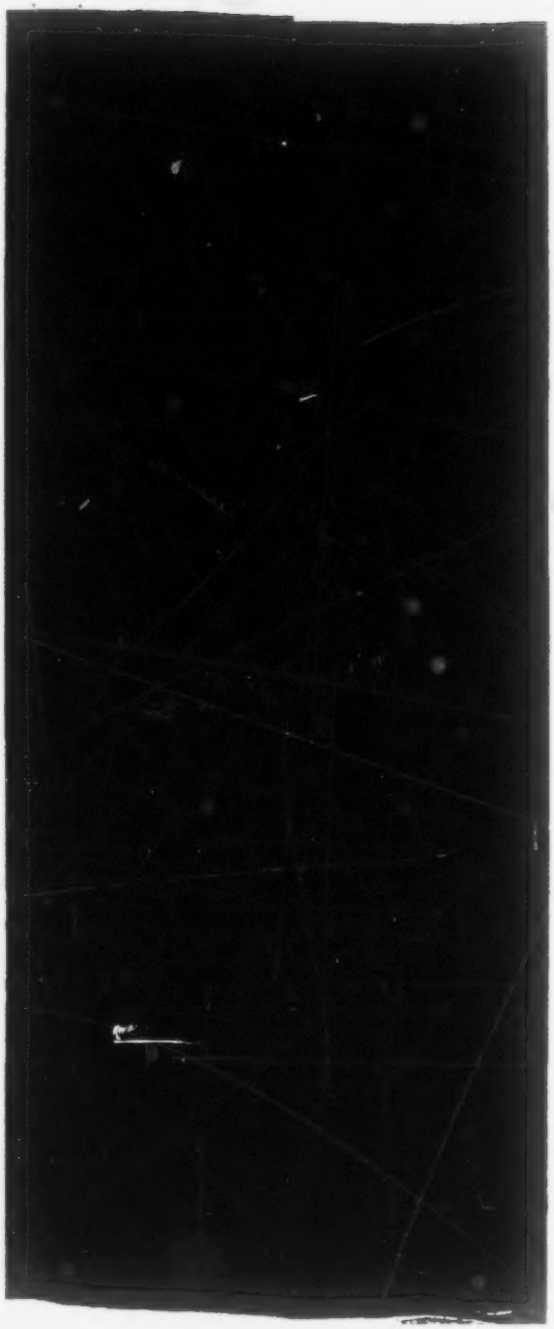

Image:Symbol.jpg

From Heroes Wiki

- Image
- File history
- Links
- Metadata

No higher resolutions available.
Symbol.jpg (450 × 350 pixel, file size: 7 KB, MIME type: image/jpeg)

The Symbol which appears throughout *Heroes*

redrawn by user:Cdhamrison, resized for category:Tattoos

File history

Click on a date/time to view the file as it appeared at that time.

	Date/Time	User	Dimensions	File size	Comment
current	20:04, 21 December 2006	Hardvice (Talk | contribs)	450×350	7 KB	The Symbol which appears throughout "Heroes". redrawn by user:Cdhamrison, resized for category:Symbols Category: Symbols Images

- "In an interview concerning the Symbol, Tim Kring says, "I would just say that part of the fun of watching the show is seeing how certain things crop up. And if you look at that symbol carefully, you might be able to figure it out. By the way, the symbol also shows up in places viewers can't see. On the door of a room in the soundstage where *Heroes* shoots, the sign reads 'PROPS' — with that special S as the symbol."

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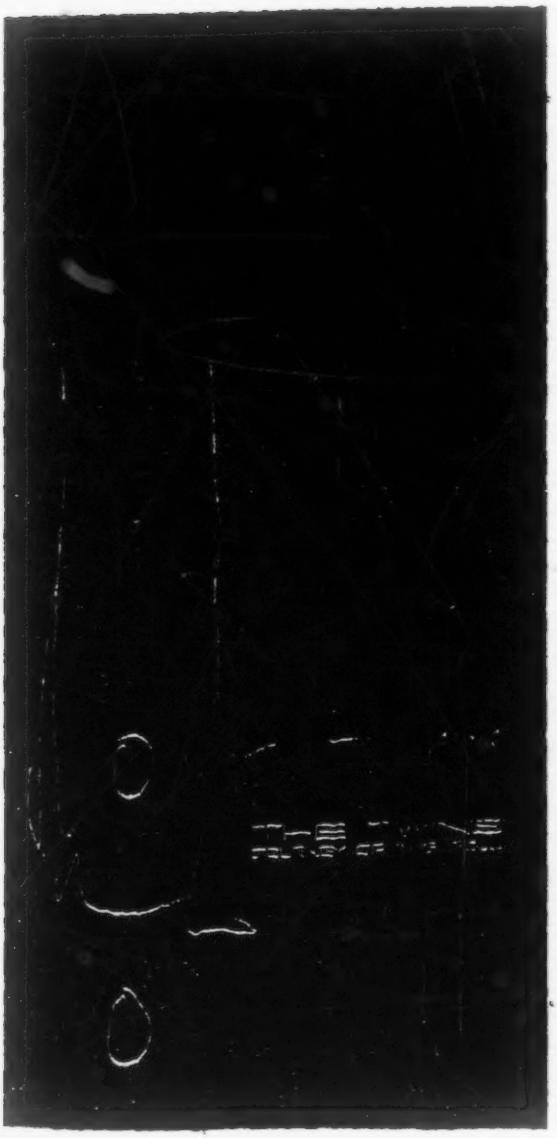
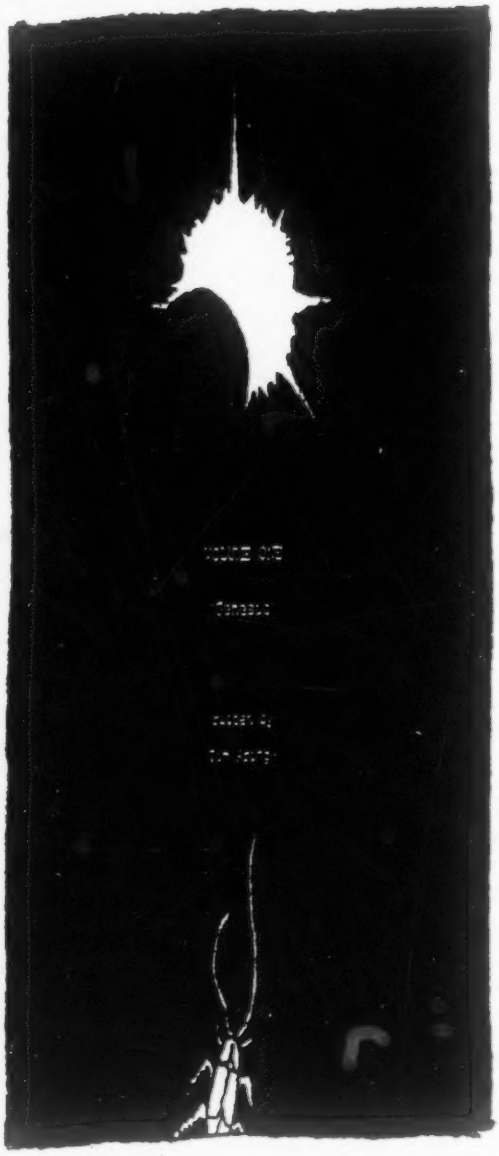
APPENDIX I

Example of side by side visual substantial similarity of cover of petitioners' script vs respondents' NBC Heroes script cover

[See Foldout Page]





NOTE:

AFTER THE TWINS

ENJAJ & AMNAJ EELE,

TIM KRUNG IS THE

ONLY WRITER IN THE

HISTORY OF HOLLYWOOD

TO ADD ART TO A SCRIPT.

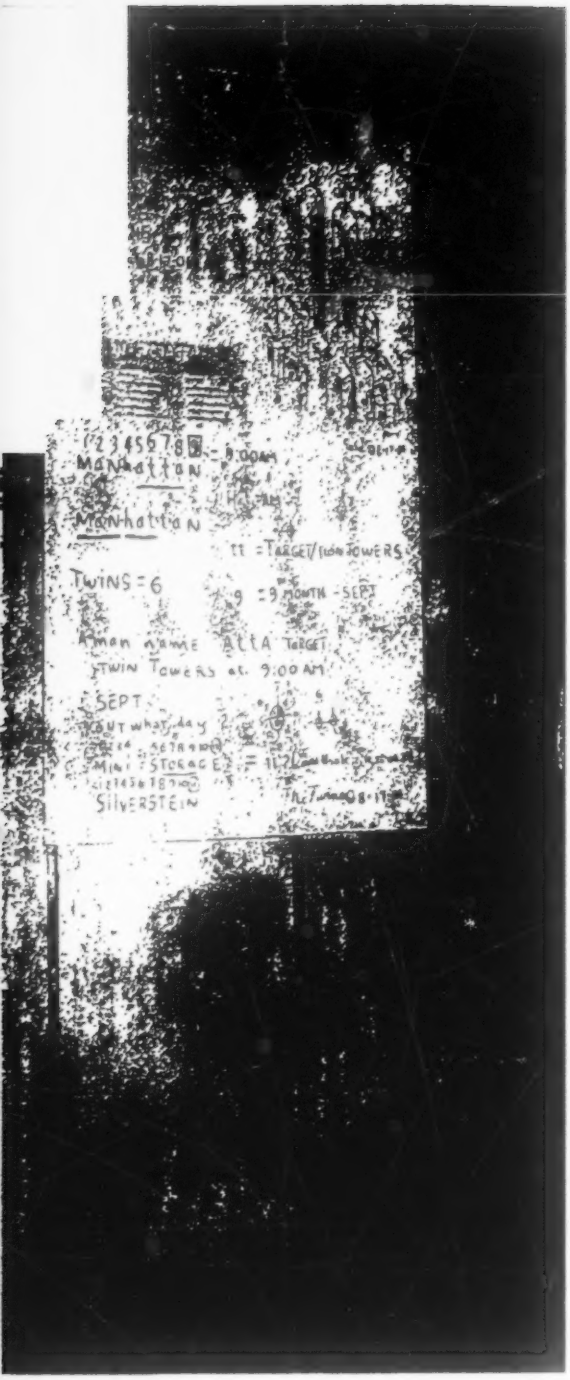
[redacted]

SC: I thought it was very
[illegible]. I've lived in different
[illegible]. I've been South America
but I grew up in Europe mostly
and I thought that people from
all over the world would like it.
Also there was a lot of
connections on different people
would have their favorites and
identify with each one in the
story. I really liked that there
were a few drawings already in
the script, which you don't
normally see, like in the
chapter pages and the
introduction. They were simple
drawings but it just gave it a
feel and an atmosphere in a
gritty entertainment way which really stood out for me

APPENDIX J

Example of side by side visual substantial similarity of petitioner Enjai Eele's painting titled: "Twice" and respondents' NBC Heroes Issac Mendez painting

[See Foldout Page]



writing the pilot. I told him I wanted to include some artwork in the script as a sales device. Basically, I wanted to hire an artist out of my own pocket to do just a few pieces for the script. So, I asked Jeph to send me a couple of people and he got me in touch with Tim.

Note: TIM SALE does ALL ACTION HEROES And he's NEVER PAINTED ON LARGE CANVAS

http://www.comicbookresources.com/news/newsitem.cgi?NE=8301 Better Heroes

Note: SKETCH OF ISAAC MENDEZ FROM TIM KRAINES HEROES SCRIPT 2006

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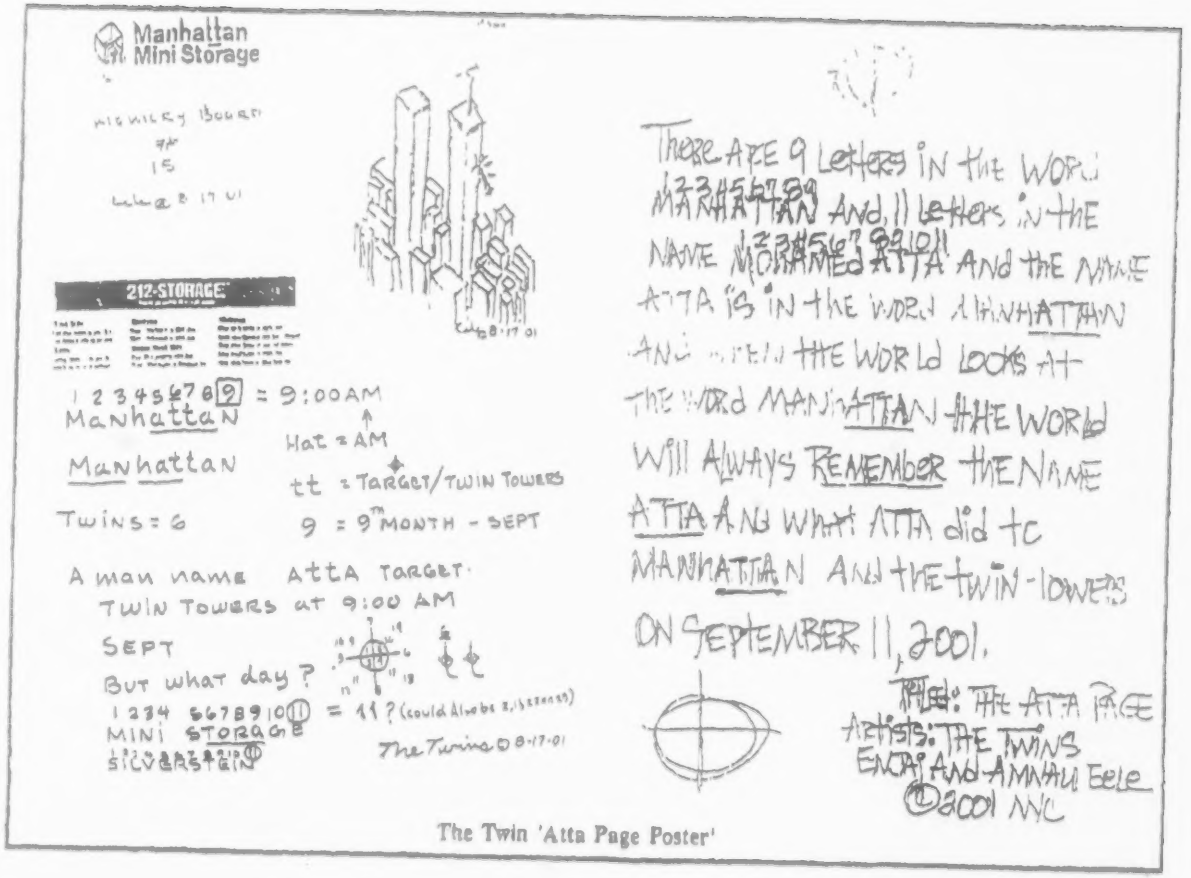
APPENDIX K

Couple to appeal verdict in infringement suit against NBC-TV unit

By J. Zamgba Browne

Special to NY Beacon

NEW YORK BEACON,
September 17, 2009 - September 23, 2009
newyorkbeacon.com


Manhattan
Mini Storage
212-STORAGE
1 2 3 4 5 6 7 8 9 = 9:00AM
Manhattan
Hat = AM
tt = TARGET/TWIN TOWERS
Manhattan
TWINS = 6
9 = 9TH MONTH - SEPT
A man name ATTA TARGET
TWIN TOWERS at 9:00 AM
SEPT
But what day?
1 2 3 4 5 6 7 8 9 10 11 = 11? (could also be 9/11 EXPRESS)
MINI STORAGE
The Twins © 8-17-01
There are 9 letters in the word MANHATTAN and 11 letters in the name MOHAMMED ATTA and the name ATTA is in the word MANHATTAN and when the world looks at the word MANHATTAN the world will always remember the name ATTA and what ATTA did to MANHATTAN and the twin-towers on September 11, 2001.
TITLE: THE ATTA PAGE
Artists: THE TWINS
ENCAI and AMAHL EELE
©2001 NYC

The Twin 'Atta Page Poster'

Amnau Karam Eele and Clifton Mallery, a husband and wife team who can paint and write the future, plan to appeal their multi-million dollar copyright infringement lawsuit after losing the case in U.S. District Court against giant NBC Universal Television Studio.

The couple, better known as the "The Twins," said they couldn't figure out how Justice Denise Cote could have possibly ruled against them when a member of the defense admitted in open court to copying their material.

"What Judge Cote's decision really means," said Eele, "is that your intellectual property is no longer protected. It also means that NBC can come to your book signing, take your copyrighted book and copy it, admit to doing so in a court of law and then turns around and awards NBC a victory,"

"The ruling further means that NBC will own our copyright 100 percent, because the presiding Judge and NBC attorneys reduced our copyrighted intellectual property to a mere idea' and a 'classic scene affairs' that could be found in any work in Hollywood," said Eele. The twins plan to appeal the decision all the way to the U.S. Supreme Court if necessary.

The material, according to the complaint filed in the U.S. District Court in Manhattan, was used in a popular NBC drama series, "Heroes." Prior to the hearing, NBC reportedly agreed to a $750,000 settlement which was rejected by the Twins.

The lawsuit alleged that two individuals, who identified themselves as writers from NBC, took copies of the twins' work from a 2005 exhibition at Hunter College in Manhattan.

The series, Heroes, tells the story of a recovering heroin addict, Isaac Mendez (Santiago Cabreera) who discovers he has the ability to slip into a deep trance and paint scenes from events that haven't yet happened.

The Twins charged in court papers that some of the characters in the NBC drama series are "strikingly similar" to ones they created in their story and artwork titled, "an artist who can paint the future." The work includes prediction of the destruction of two prominent New York City buildings.

Eele and Mallery said they were convinced the NBC drama series is based on their work because they too have over the years predicted the future through writings and art forms which they created.

They cited a painting, "The Atta Page, which they developed shortly after moving to New York City from Texas. The painting depicts the destruction of the World Trade Center months before it happened with the following message:

"There are nine letters in the word Manhattan and 11 letters in the name Mohammed Atta. Atta was the ringleader in the terrorist attacks on the World Trade Center," Eele explained.

"Whenever one looks at the word Manhattan, he or she will remember the name 'Atta' and what he did to

the twin towers on Sept. 11, 2001," she added. Eele said the painting also depicts the warning that, "A man named Atta will attack the World Trade Center twin towers at 9 a.m. on Sept. 11, 2001."

Eele said she and her twin partner started a grassroots movement and took their work to Union Square in Manhattan aimed at warning as many people as possible about the meaning of their art work and a possible attack on the World Trade Center.

"Many people laughed at us, saying we are weird and crazy. Others thought we were religious fanatics, while others tore up our 'Atta Flyers' that were being passed out in the Union Square area," Eele continued.

She said the police "even threatened to send us to Bellevue Hospital for psycharitic examination as they labeled us as out of town artists." Eele said a friend suggested that they take their work to a Tribeca Film festival that was in progress in SoHo which they did.

"Our work on the destruction of the Trade Center was returned to us by the festival," with no explanation, said Eele. She also said that on April 22, 2005, she and her twin partner were invited to Hunter College to show a film they had developed, titled," The Letter" to show the students.

At Hunter College, the twins discussed what it meant to be an artist, especially one who has the ability to paint and write the future, and how and why they created a fictional character called "Idai Markus" based on their real life experiences.

"Several NBC writers showed up at our show uninvited," said Eele. After the show, Eele said she and her partner watched as a few of them took some free materials from a table we had set up in the lobby area for students.

She said a lawyer whom they had retained told them, "Your story and art work" are going to be on a new NBC-TV show called "Heroes." The twin said they decided to watch the show and sure enough, "it had our characters, and art work with story line, "The NYC Artist who can paint the future" written on a giant size canvas. "We immediately contacted our attorney to begin legal proceedings against NBC," said Eele.

A lawsuit was field in their behalf, but they lost the case. In her decision, Justice Cote ruled that the twin failed to substantiate their claim that NBC stole their work.

Furthermore, Judge Cote said in essence, that the Twins' copyrighted material was a "mere idea and classic scene affairs" that could be found in any work in Hollywood and therefore NBC had the right to use it.

Judge Cote also ruled in a counter lawsuit by NBC that the Twins pay NBC the sum of $99,106.45 in attorney fees and court cost.

APPENDIX L

E-mail from John Coleman to Marcia Paul,
the Twins declined settlement

Begin forwarded message:

From: "John A. Coleman, Jr."
coleman@fccplaw.com>
Date: December 17, 2007 1:05:26 PM EST
To: Marcia Paul <marciapaul@dwt.com>
Subject: Mallery v. NBC

Marcia:

My clients decline NBC's settlement offer.

John

John A. Coleman, Jr.

Friedberg Cohen Coleman & Pinkas, LLP

444 Madison Avenue
Suite 805
New York, New York 10022
Tel (212) 829-9090
Fax (212) 829-0999

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APPENDIX M

(S.D.N.Y), *aff'd*, 738 F.2d 419 (2d Cir. 1984).

> plaintiffs' artist who can paint the future is not just an idea, he's a fully expressed character, particularly in plaintiffs' 777-page novel. The reader learns of Idai's birth, upbringing, and ultimately central struggle with his divination art and how to relay his prophesies to others – the very struggle that Isaac Mendez faces on defendants' show.

Pl. Br. at 19. This statement succinctly demonstrates plaintiffs' fundamental misunderstanding of the idea/expression dichotomy.

Defendants do **not** dispute that Idai is a fully developed character in plaintiffs' novel, and that the expression of his character is complex and, to some extent, original.

APPENDIX N

[p.13]

95JVMALC Argument

JUDGE RAGGI: The district judge acknowledged that your client had a copyright; so we don't have to be concerned that she didn't understand that, right?

MR. CONFUSIONE: No, I agree.

JUDGE RAGGI: And similarly, she acknowledged the attendance at the event where an NBC representative, I believe it was, had an occasion to see the film; so we know she understood that.

MR. CONFUSIONE: Right. I agree. And I submit actual copying has been determined at this stage, again, at the procedural posture at this stage. The only question is whether or not the things he copied were unlawful. And in my view, I think the Court could not decide as a matter of law that

JUDGE RAGGI: Do you want to respond at all to counsel's argument that this is just an idea, that it's just an idea about the context of the character?

MR. CONFUSIONE: Again, I think I refer again to the illustrations I made in the brief about the surfer. If it was just an idea, why did the idea, in other words, track to many different characteristics of the way the idea was expressed in the plaintiff's work. It tracked

too many of them. And, again, I would rely on *Feist* and the rug cases, which I think those rationales are very relevant here.

JUDGE RAGGI: OK. I think we have your argument. We'll take the case under advisement. Thank you. (Adjourned)

APPENDIX O

Tim Kring - Heroes
http://blog.the-eg.com/2007/12/04/tim-kring/

Creator of Heroes. How it got started,

Had the format, just needed an idea. My wife an I are raising kids, I've become obsessed and concerned with the way the world is these days, and what they'll be inheriting. Where will the heroes come from? We can't rely on government or institutions.

I lied and cheated and schemed and manipulated all the way through the idiocy that is the notes process when you do this, was able to push the production through relatively unscathed and in the form that it would work in. I finally gave that kid who stares out the window a voice. That's how Heroes got on the air.

It's not the most original idea in the world, you build and borrow. Just put these pieces together in the right way, at the right time, and on the right network.

Rebel Alliance
http://www.fastcompany.com/magazine/125/rebel-alliance.html

BY DAVID KUSHNER Fri Apr 11, 2008 at 11:46 AM

How a small band of sci-fi geeks is leading Hollywood into a new era.

Tim Kring, the lanky, goateed guy at the head of the table, created *Heroes,* NBC's hit television show about superpowered people.

"We are literally making up the parameters of the intellectual property that will take the networks into the next generation," Kring says. The others nod in agreement. "We're the beta-testing ground. It's a Wild West: There are no rules. Just take something that sounds cool and go try it."